



O'CHIESE FIRST NATION

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September 15, 2021

Coal Policy Committee & Alberta Energy
300, 801 - 6th Avenue S.W.
Calgary, Alberta T2P 3W2

Dear Committee Members,

RE: O'Chiese First Nation's Submission on Government of Alberta's Coal Policy Review

This submission is made on behalf of the Chief and Council of O'Chiese First Nation. The Chief and Council of O'Chiese First Nation have the elected authority and responsibility to protect the Inherent and Treaty Rights of O'Chiese First Nation. The Inherent and Treaty Rights of O'Chiese First Nation are recognized by Treaty 6 and Section 35, *Constitution Act*, 1982.

O'Chiese First Nation is bound by Kaa-Ke-Chi-Ko-Moo-Nan, O'Chiese First Nation's Great Binding Law ("Natural Laws"). As such, O'Chiese First Nation operates under its own distinct set of legal principles and laws that have been in place since time immemorial, which we understand and expect are protected by Treaty 6 and Section 35 of the *Constitution Act*, 1982. Our Natural Laws are the foundation for O'Chiese First Nation Peoples.

Background

On May 31, 2020, the Government of Alberta announced it would restructure how it manages coal mining in Alberta, starting with repealing the 1976 Coal Policy. From May 31, 2020, to February 8, 2021, the Government of Alberta lifted restrictions on coal mining on lands previously identified as sensitive under the 1976 Coal Policy and issued new exploration and mining leases on Category 2 Lands, where open pit mining was previously prohibited.

These actions led to widespread public backlash after which the Government of Alberta announces it would limit new leases to exploration activities until April 23, 2021, and new leases issuances stopped entirely following that date. The Government of Alberta then announced its intention to develop a new coal policy.

Currently, the Government of Alberta, via Alberta Energy and a Coal Policy Committee, has been completing a public consultation process, accepting comments and documents from Indigenous nations and other stakeholders until September 19, 2021, with a final report due to the Minister of Energy on November 15, 2021.¹

¹ <https://www.alberta.ca/coal-policy-engagement.aspx>

Outline of O'Chiese First Nation's Submission

We provide this written submission to the Coal Policy Committee and the Government of Alberta as part of our ongoing efforts to participate in consultation with the Government of Alberta via Alberta Energy on its review and update of Alberta's coal policy. In this submission we seek to emphasize our deep concerns with coal policy and coal development in Alberta including:

1. The Government of Alberta's approach to coal policy consultation
2. The Government of Alberta's approach to coal policy development
3. The Government of Alberta's recognition and protection of Inherent and Treaty rights
4. The deficiencies with provincial regulation of coal development
5. The lack of consideration to cumulative effects and the taking up of lands as it relates to coal development and guiding legislation, regulations, policies, and plans.

It is our expectation that the Coal Policy Committee and Alberta Energy will directly and explicitly consider and include our written evidence in its final reports and in the development of a new coal policy.

Methodology

O'Chiese First Nation developed evidence for our written submission which outline the deficiencies in the Government of Alberta's coal policy consultation and development process, along with overarching issues with the Government of Alberta's failure to consider and protect Inherent and Treaty rights. The primary tasks undertaken by O'Chiese First Nation included a review and examination of the following:

1. coal policy development documents and expert submissions to the Government of Alberta on coal development,
2. previously collected Nation data related to impacts from development, and,
3. current levels of lands taken up and cumulative effects within Category 1, 2, 3, and 4 Lands as identified by the 1976 Coal Policy ("study area") (see Figure 1 of map package attached below).²

O'Chiese First Nation has attached a set of maps³ to this submission that provide details on current levels of cumulative effects and lands taken up within the identified study area. We will be referring to these maps and their findings within our written evidence.

The maps provide visual and spatial data pertaining to:

1. the current levels of lands taken up within the identified study area⁴ and,
2. the current levels of disturbance and human activity present within the identified study area.⁵

O'Chiese First Nation additionally applied 500m buffers, or 'zone of influence', around all current dispositions and disturbance, or human activity, in the study area to demonstrate avoidance of Nation members of dispositions and disturbances while exercising their Inherent and Treaty

² The Nation relied on geospatial data retrieved from O'Chiese First Nation's records, AltaLIS Ltd., the Alberta Biodiversity Monitoring Institute ("ABMI"), the Government of Canada, and the Government of Alberta for the purpose of this written submission.

³ Figures 1- 4 attached below.

⁴ Data derived from AltaLIS Ltd.'s DIDs layers. Current as of September 10, 2021.

⁵ Using geospatial data sets compiled by ABMI that detail the existing human footprint. Current as of September 10 2021.

rights. This 500m buffer is in accordance with court-accepted buffers applied in the recent *Yahey (Blueberry River First Nations) v. British Columbia* 2021 BCSC 1287 decision. In this decision it is noted that “the use of a 500-metre zone of influence is considered conservative because avoidance is generally related to the level of activity rather than the features themselves.”⁶

Deficiencies with the Government of Alberta’s Approach to Coal Policy Consultation

There is a widespread lack of confidence in the Government of Alberta’s management of coal development. The opinion of the public is the regulatory system continues to fall short, with “more than 85 percent of [Albertans] who responded... were not at all confident that Alberta’s regulation of coal mining was safe, efficient, orderly or environmentally responsible.”⁷ O’Chiese First Nation shares in that lack of confidence. After years of witnessing the Government of Alberta take up lands and encourage development without proper consideration to impacts to our Inherent and Treaty rights and the environment, we have no confidence that a new coal policy will lead to any changes.

Our concerns with the Government of Alberta’s approach to assessing and regulating coal development have only been amplified based on our experience in this coal policy consultation process.

The Government of Alberta appears to only be conducting this coal policy consultation process to appease public dissent on coal and the repealing of the 1976 Coal Policy.

The Government of Alberta’s approach to consultation for this coal policy development process has not facilitated a two-way dialogue, nor has it provided meaningful opportunities for O’Chiese First Nation to participate in this consultation process.

To-date O’Chiese First Nation has attended two open-house meetings hosted by the Government of Alberta and participated in a one-on-one meeting with Government of Alberta representatives.⁸ We have additionally submitted two letters to the Government of Alberta.⁹ In all instances of our engagement, we have provided the Government of Alberta with ample details on our concerns with coal development and the approach the Government of Alberta is taking for the coal policy consultation process. We have also posed several critical questions to the Government of Alberta regarding coal policy development and the consultation process. All our concerns have gone unacknowledged, and our questions have gone unaddressed.¹⁰ Moreover, the Government of Alberta has not provided us with any capacity to support our participation in this consultation process. O’Chiese First Nation has been required to carry the cost of reviewing all documents, attending meetings, corresponding with Alberta Energy and the committee, and developing this written submission. The lack of capacity, coupled with Alberta Energy’s failure to respond to our questions and information requests, has severely limited our ability to participate in this process.

We urge the Government of Alberta to reevaluate its consultation approach and take steps to remedy the current deficiencies. Steps to be taken include providing capacity to First Nations to meaningfully participate in the consultation process and ensuring that all information requested

⁶ *Yahey (Blueberry River First Nations) v. British Columbia* 2021 BCSC 1287 at para 1054.

⁷ Olszynski. *A Brief History of Regulatory Failure*. (2021) <https://www.cbc.ca/news/canada/edmonton/coal-survey-results-economic-environment-1.6030796>.

⁸ Open houses were held on June 22, 2021, and 23. The one-on-one meeting occurred on July 15, 2021.

⁹ Letters were sent on June 25, 2021, to Alberta Energy Regulator and on July 21, 2021 to Minister Savage.

¹⁰ Follow up email sent August 3, 2021.

by Nations to inform consultation is provided in a timely and accessible manner. This process is too important to be rushed and this policy is too critical to be developed based on a deficient consultation process. Until such time that the Government of Alberta can sufficiently discharge the duty to consult and accommodate, the development of a coal policy should be halted, and no new coal activities should be permitted.

Deficiencies with the Government of Alberta's Approach to Coal Policy Development

Coal development cannot be considered in isolation. Where, how, and when coal activities may be permitted in the future, if at all, must taken into consideration current conditions and lands and resources and how they are managed. This means that any coal policy developed by the Government of Alberta should be directly linked and include considerations to any government legislation, regulations, policies or other initiatives that may relate to lands and resources.

Unfortunately, this is not occurring; The Government of Alberta is currently undertaking several other key initiatives that will directly influence and be influenced by a new coal policy. This includes the ongoing sub-regional land use planning processes for Berland and Wandering River, the proposed *Trails Act*, and the surface water quality framework planning process for the North Saskatchewan River. All these government initiatives remain ongoing and will likely not be finalized before a new coal policy is set to be drafted. As such, none of these plans, or their contents, will be included in a new coal policy.

During our meeting with Alberta Energy, we were informed that there were no formal collaborative efforts, or considerations being made, between the coal policy, sub-regional land use, and water quality management framework processes. Alberta Energy additionally noted that plans to ensure alignment between these processes and their final outputs had not been identified. By failing to consider interrelated government legislations, regulations, policies, and plans being developed by other Government of Alberta departments or groups, the Government of Alberta is at risk of creating a policy that, due to large gaps and potential contradictory messaging, will fail.

Alberta Energy indicated that the new Alberta Coal Policy is expected to be smaller in scope compared to the 1976 Coal Policy.¹¹ This is inappropriate, the scope of a new coal policy should be bigger, not smaller given what we know about the significant impacts from coal development. The impacts from coal development were recognized in both the recent Joint Panel decision on Grassy Mountain¹², and the Government of Canada's statements around the impacts

If the Government of Alberta were to conduct its planning processes more holistically and on broader scopes to cover all connected matters including, but not limited to land use, consultation, environmental protection, water, species at risk, industrial development, recreation and parks, and agriculture, the risk of creating a failed policy would diminish.

¹¹ This was noted by Alberta Energy during our July 15, 2021 meeting.

¹² The impacts of coal development were discussed and recognized by the recent Joint Panel review decision on the proposed Grassy Mountain Mine project. It was recognized that the project was expected to act cumulatively with other past, existing and future physical activities, with potential effects on Indigenous valued components, at para. 2199. The report further recognized that the project could contribute to cumulative effects on cultural and spiritual values through reduction or loss of access to important sites and indirect effects due to avoidance of areas and conflicts with other land users, at para. 2202. The panel ultimately concluded that the project was likely to result in significant adverse environmental effects on water quality, westlope cutthroat trout and their habitat, whitebark pine, rough fescue

of thermal coal mining and other coal development.¹³ As such, coal development cannot continue to be approved at the rate it previously has been or under the same assessment process. Any potential future coal activities must be critically and fully reviewed within a process that insists upon a fulsome assessment of impacts, including impacts to Inherent and Treaty rights, and that requires direct and proportional accommodation of impacts if approval is granted.

Beyond the need for a fulsome new coal policy to be developed in collaboration with other related government initiatives, there must also be considerations made to how the policy is enacted and under which legislation it is regulated.

The new coal policy should not be vulnerable to be unilaterally revoked without consultation, discourse, or accountability, as was the case with the 1976 Coal Policy. Nigel Bankes in his submission to the Coal Policy Committee noted that making the policy legally binding will also “provide clarity to all concerned as to the status of the policy”¹⁴, as well as the fact that “...any proposal to change a coal policy that is legally binding will require more public discussion and likely a debate in the legislative assembly.”¹⁵ The new coal policy must be legally binding to all relevant parties, including the Alberta Energy Regulator, Department of Energy, Alberta Environment and Parks, and parties with agreements under relevant coal legislation.¹⁶ By making the policy legally binding, the policy cannot be revoked at the whim of the Government and the Minister of Energy, and instead will require more public consultation and likely debate in the legislative assembly.¹⁷

Additionally, O’Chiese First Nation is concerned with placing the new coal policy under the *Alberta Land Stewardship Act*, 2009 (“ALSA”). O’Chiese First Nation finds ALSA and related processes, including land use planning, to be ineffective¹⁸; ALSA and related processes fails to consider cumulative effects, lands taken up, and impacts to Inherent and Treaty rights. A new coal policy must be a legally binding standalone statute.¹⁹ This standalone statute would accord “legal effect to the entire coal policy or the most significant parts thereof.”²⁰ This would include additions such

grasslands, and vegetation species and community biodiversity. They further found that the project would result in the loss of lands used for traditional activities, and this would effect Indigenous groups and their members who use the project area. Also found that the project would result in significant adverse effects to physical and cultural heritage for three Treaty 7 First Nations, p. vii). *Grassy Mountain Coal Mine* (2021).

¹³ The Minister of Environment and Climate Change (Canada) has issued a policy statement that Canada is aiming to transition away from thermal coal mining and project expansions as they are likely to cause unacceptable environmental effects and do not match Canada’s domestic and international climate change commitments. The impacts of coal development were also discussed and recognized by the recent Joint Panel review decision on the proposed Grassy Mountain Mine project.

¹⁴ Nigel Bankes. *A New Coal Policy for Alberta in the Age of Net Zero: Questions of Implementation*. (2021) p.?

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ In an April 2016 letter to the Minister of Indigenous Relations, Richard Feehan, O’Chiese First Nation expressed concerns around the North Saskatchewan Regional Plan. The North Saskatchewan Regional Plan (“NSRP”) lacks information about land available for the exercise of treaty rights, including an understanding of O’Chiese First Nations preferred manner of exercising rights. O’Chiese First Nation also provided recommendations to Minister of Aboriginal Relations, Jim Prentice on January 20, 2015, recommending placing the NSRP within a treaty context, including increased reference to treaty rights and separating the understanding of Treaty rights from Traditional Use. O’Chiese First Nation further recommended identification of lands taken up in Treaty 6, as well as a description of negative impacts to Treaty rights resulting from the land use process itself. Ultimately O’Chiese First Nation expressed that the root problem of Alberta’s Land Use Planning process is its failure to plan for Indigenous land use consistent with Alberta obligations under the Treaties and the Constitution of Canada.

¹⁹ Bankes. *A New Coal Policy*. (2021) p.2.

²⁰ Ibid.

as regulations around cumulative effects, and protections around impacts to Inherent and Treaty rights.

Deficiencies with the Government of Alberta's Recognition and Protection of Inherent and Treaty Rights

The Government of Alberta has made no secret of its support of coal development in Alberta. Despite coal production, particularly thermal coal production, being known as an unacceptable climate change risk²¹, it appears that coal development in Alberta is still a growing industry that is buoyed by the Government of Alberta.

This support and encouragement of coal exploration and development is made even more problematic to O'Chiese First Nation due to the extreme lack of consideration to Inherent and Treaty rights within the Alberta regulatory processes, legislation, regulations, policies, and other initiatives related to land, resources, and development.

The Government of Alberta's current definition of our Inherent and Treaty rights is narrowed to only include hunting, trapping, and fishing for food. Other critical aspects of O'Chiese First Nation's Inherent and Treaty rights are then placed under the umbrella term 'traditional uses' and are not considered to be rights. This narrow view of Inherent and Treaty rights allows the Government of Alberta to reduce its accountability and requirements to protect and preserve our rights.

It is critical that the Government of Alberta recognize the full scope of our Inherent and Treaty rights. Once this happens the Government of Alberta can take steps to amend current regulatory process along with legislation, regulations, policies, and other initiatives related to lands, resources, and development to facilitate proper consideration and protection of Inherent and Treaty rights in all government actions and decision moving forward. Without this occurring, any new coal policies and subsequent potential coal activities will continue to result in unaccommodated impacts to our Inherent and Treaty rights.

Deficiencies with the Provincial Regulation of Coal Development

Coal development activities²² create impacts that lead to the diminishment of O'Chiese First Nation's Inherent and Treaty rights. As a result, we work tirelessly to participate in duty to consult and accommodate processes related to coal development. We engage in these processes because we have no other choice if we want to try and protect our Inherent and Treaty rights from further violations. Unfortunately, our efforts to identify and communicate impacts to our Inherent and Treaty rights, and to make proponents and the Government of Alberta recognize and accommodate impacts to our rights are largely ignored.

The Government of Alberta has designed its regulatory process to benefit the proponents at the expense of Inherent and Treaty rights and the environment. The Government of Alberta makes every effort to avoid fulfilling its duty to consult and accommodate with O'Chiese First Nation on

²¹ The Minister of Environment and Climate Change (Canada) has issued a policy statement that Canada is aiming to transition away from thermal coal mining and project expansions as they are likely to cause unacceptable environmental effects and do not match Canada's domestic and international climate change commitments. The impacts of coal development were also discussed and recognized by the recent Joint Panel review decision on the proposed Grassy Mountain Mine project.

²² Including activities undertaken during exploration, construction, operation/maintenance, and closure/reclamation phases.

development projects within our territory and on Treaty 6 lands.²³ This is spread to proponents, who, following the Government of Alberta's poor example and deficient processes, are not required, and frequently refuse, to provide the capacity required for us to identify impacts (project-specific and cumulative) to Inherent and Treaty rights and proper accommodations for those impacts.

As recently noted in the *Yahey* decision, a provincial government's power to take up lands "is not infinite. The province cannot take up so much land such that Blueberry can no longer meaningfully exercise its rights to hunt, trap, and fish in a manner consistent with its way of life. The province's power to take up lands must be exercised in a way that upholds the promises and protections in the Treaty."²⁴ This is not considered by the Government of Alberta's regulatory process for coal, or within the *Public Lands Act*, 2000 disposition allocation process.

The lack of consideration to Treaty promises, cumulative effects, and lands taken up thresholds places the provincial and federal governments at risk for infringing upon Inherent and Treaty rights.

The assessment of a proposed project, and the granting of a *Public Lands Act* disposition, does not require considerations to lands taken up and current cumulative effects to Inherent and Treaty rights.²⁵ As a result, the Government of Alberta has continuously approved coal projects without proper consideration to cumulative impacts to O'Chiese First Nation's Inherent and Treaty rights or thresholds for taking up lands.

Several reports submitted to Alberta Energy have identified the flaws in the Alberta regulatory system concerning cumulative effects, including "serious deficiencies in regulatory practice and design; inadequate environmental impact assessment (EIS) processes; deficiencies in assessing and managing cumulative effects, insufficient monitoring and enforcement; and inadequate bonding for reclamation and restoration."²⁶ It was noted in *Re: A Brief History of Regulatory Failure in Alberta (or Why Albertans Do Not Trust Their Regulators)* (2021) submitted by Martin Z. Olszynski that "departments lack capacity to complete EIAs, to complete technical studies such as those involving instream flows, to focus on cumulative effects and to develop policy in a timely fashion. In addition, capacity to monitor and enforce environmental requirements is inadequate."²⁷

The Government of Alberta has not given sufficient attention to Treaty promises, or the amount of lands it is taking up with each new project approval.

The Alberta Environmental Monitoring Panel also reported that inadequate monitoring requirements, result in "an inability to identify critical knowledge gaps... provide sufficient feedback to develop standard environmental monitoring methods...establish

²³ Including only triggering consultation with O'Chiese First Nation within an inadequate and abstract consultation boundary, limiting consultation timelines, minimizing requirements for proponents to engage First Nations, providing insufficient annual consultation capacity funding for operation of our consultation office, and not considering cumulative impacts to Inherent and Treaty rights or setting thresholds for lands taken up.

²⁴ *Yahey v. British Columbia* 2021 BCSC 1287 at para 1809.

²⁵ Within the regulatory process, the impact assessment conducted by the proponent does not require explicit assessment of cumulative effects. proponent is only required to complete an assessment of cumulative effects if a studied effect is determined to be 'significant'. Proponents design their impact assessments to show no, or negligible effects, thereby eliminating the requirement to complete a cumulative effect assessment.

²⁶ Martin Z. Olszynski. *Re: A Brief History of Regulatory Failure in Alberta (or Why Albertans Do Not Trust Their Regulators)* (2021) p.1.

²⁷ Radke Report. *Investing in our Future: Responding to the Rapid Growth of Oil Sands Development: Final Report*. (2006) cited in Olszynski A. *Brief History of Regulatory Failure* (2021) p.2.

meaningful environmental baselines and reference conditions essential for cumulative effects monitoring.”²⁸

There is a significant lack of understanding as to what the current levels of lands taken up are within O’Chiese First Nation’s territory and on all lands to which the Nation holds Inherent and Treaty rights. Additionally, there is lack of understanding by the Government of Alberta as to the current extent and depth of cumulative impacts to O’Chiese First Nation Inherent and Treaty rights. These are critical information gaps that the need to be resolved. Unfortunately, the Government of Alberta appears unwilling to take the necessary action to understand current levels of lands taken up or identify thresholds for infringement.²⁹

Not considering cumulative effects or identifying thresholds for lands taken up within legislation, regulations, policies, and other government initiatives, or within regulatory processes is a failing of the Crown to uphold its Treaty promises and to protect Inherent and Treaty rights.

When adhering to Treaty 6, O’Chiese First Nation, understood that our way of life could continue as it always had since time immemorial. We have upheld our part of the Treaty agreement; however, the Government of Alberta and the Government of Canada have not upheld theirs. Treaty 6 states:

“Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and *saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.*”³⁰

Furthermore, in the *Natural Resources Transfer Act*, 1930, the Government of Alberta agreed to ensure that there would continue to be lands available for the exercise of rights, with Indigenous peoples being granted the right to exercise their rights on all unoccupied Crown Lands and “on any other lands to which the said Indians may have a right of access.”³¹

While it is understood that lands may be taken up by the Crown from time to time, this cannot happen at the expense of treaty promises and the meaningful exercise of Inherent and Treaty rights. As previously stated, the *Yahey* decision noted there are limits to a governments ability to take up lands in so far that it results in the diminishment of Inherent and Treaty rights. The Government of Alberta has failed to uphold its

The new coal policy cannot be developed without understanding current levels of lands taken up and cumulative effects.

²⁸ *A World Class Environmental Monitoring, Evaluation and Reporting System for Alberta: The Report of the Alberta Environmental Monitoring Panel*. (2011). Cited in Olszynski *A Brief History of Regulatory Failure*. (2021) p.3.

²⁹ O’Chiese First Nation, in a July 2021 correspondence to Minister Wilson on geodata mapping and consultation areas, asked if the Government of Alberta had identified thresholds for the amount of land that is required to meaningfully exercise Aboriginal and Treaty rights. We additionally asked whether these thresholds, or lack thereof, influence and impact the O’Chiese First Nation consultation area unilaterally imposed on us by the Government of Alberta. In its response on July 16, 2021, the Government of Alberta indicated that there are no set thresholds for the amount or status of land included in First Nation consultation areas.

³⁰ *Treaty 6*, 1964, para 17. [emphasis added]

³¹ *Natural Resources Transfer Act* (1930) at para 12.

promises under Treaty 6 and the *Natural Resources Transfer Act*. The Government of Alberta has continued to take up lands without considering how much land remains and whether the meaningful exercise of Inherent and Treaty rights remains possible.³²

We urge the Government of Alberta not to make this new coal policy another example of it failing to uphold treaty promises. Without adequate understanding and knowledge of current amounts of lands taken up within coal development areas, the Government of Alberta is at risk of creating a policy that perpetuates the infringement of Inherent and Treaty rights.

Cumulative Effects and the Taking Up of Lands

Cumulative effects are the combined effects of development and human activities within a delineated geographic extent that occur over time (past, present, and future). Assessing cumulative effects involves analyzing how specific impacts caused by each development activity or disturbance interacts with each other and how they collectively create changes (positive or negative).^{33,34}

There is a failure by western science and within western regulatory systems to understand and acknowledge that impacts classified on a project-by-project basis as 'negligible' or 'insignificant' result in significant impacts when viewed in collection.³⁵

O'Chiese First Nation is gravely concerned with the level of development, historic, current, and proposed, within our territory and on all lands to which O'Chiese First Nation holds Inherent and Treaty rights.

Development, including and especially coal, creates deep and lasting scars on landscapes and impedes the ability for O'Chiese First Nation to live in accordance with our Natural Laws and to exercise our Inherent and Treaty rights as we have since time immemorial. By not considering cumulative effects and thresholds for the taking up of lands and

infringement within provincial or federal regulatory systems, legislation, or policies, Alberta and Canada have failed to consider Inherent and Treaty rights and the spirit and intent of promises made under Treaty 6 when permitting and encouraging the taking up of lands.

Development projects, including coal development, during construction, operation/maintenance, and closure/reclamation phases, create conditions and change the legal status of lands which diminish O'Chiese First Nation's Inherent and Treaty rights. Whenever a development project is approved on unoccupied Crown land, it takes up lands that were previously accessible to O'Chiese First Nation members to freely exercise their Inherent and Treaty rights. On occupied Crown lands and private property, permission is required for O'Chiese First Nation members to exercise their Inherent and Treaty rights.

³² O'Chiese First Nation, in a July 2021 correspondence to Minister Wilson on geodata mapping and consultation areas, asked if the Government of Alberta had identified thresholds for the amount of land that is required to meaningfully exercise Aboriginal and Treaty rights. We additionally asked whether these thresholds, or lack thereof, influence and impact the O'Chiese First Nation consultation area unilaterally imposed on us by the Government of Alberta. In its response on July 16, 2021, the Government of Alberta indicated that there are no set thresholds for the amount or status of land included in First Nation consultation areas.

³³ Government of Canada. *Cumulative effects in Canada's boreal forests* (2021) <https://www.nrcan.gc.ca/our-natural-resources/forests/sustainable-forest-management/cumulative-effects-canadas-boreal-forests/23568>

³⁴ Indigenous Centre for Cumulative Effects. *Cumulative Effects* (n.d.) <https://www.icce-caec.ca/cumulative-effects/>

³⁵ Ibid.

Requiring permission to access lands is a violation to O'Chiese First Nation's Inherent and Treaty rights and Natural laws. Additionally, development activities, including coal development, create disturbances^{36,37} to the land and resources that interfere with the conditions required by O'Chiese First Nation to exercise our Inherent and Treaty rights in accordance with Natural Laws. O'Chiese First Nation members require quiet, uncontaminated, and unaltered lands, away from development and any accompanying noise, sights, or smells to exercise Inherent and Treaty rights in accordance with Natural Laws. Lands and waters must also be in proper health to maintain wildlife, vegetation, medicines, fish habitats, and facilitate healthy population sizes of all species for the exercise of O'Chiese First Nation's Inherent and Treaty rights to continue to be carried out as we always have done.

The free exercise of our Inherent and Treaty rights is only guaranteed on unoccupied Crown lands.

Repeatedly, O'Chiese First Nation has watched as lands in our territory are taken up for development, including coal development, with no consideration for cumulative effects or thresholds for infringement of our Inherent and Treaty rights. As a result, there is now an extremely limited amount of unoccupied Crown land in O'Chiese First Nation's territory that is both accessible and meets the required conditions of Nation members and Natural Laws for the exercise of Inherent and Treaty rights.

In Figure 2 of the below provided map package, O'Chiese First Nation, used data derived from AltaLIS Ltd.'s Digital Integrated Dispositions ("DIDs") layers to identify dispositions and land feature types to determine the current amount of lands taken up within the study area.

Within the total study area, 41% (3,944,865 ha) of lands are currently taken up, with another 32% (3,055,006 ha) of lands in the study area falling within the 500m buffers attached to each disposition or land type. **Only 26% (6,999,871 ha) of lands within the identified study area remains currently available for the exercise of Inherent and Treaty rights.**³⁸ Table 1 below provides further details on current amount of lands taken up in the study area and within each land category.

³⁶ ABMI in "*The Status of Human Footprint in Alberta*." (2017) at p. 10 defines disturbances to lands for human uses such as industrial development, agriculture, recreation, and residence as 'human footprint'. Human footprint is described by ABMI as the "visible alteration or conversion of native ecosystems." This includes all areas that have been altered for human use for extended periods of time and land that is periodically altered and reset to "earlier successional conditions by industrial activities."

³⁷ The *Public Lands Administration Regulations* 187/2011 provides the following definition of disturbance at PDF p 13: "disturbance", in respect of public land, means human activity that moves or removes one or more of the following features of the public land or that alters or results in the alteration of the state of one or more of those features from the state in which it existed before the human activity occurred, and includes any change in the intensity, frequency or nature of the human activity: (i) vegetation; (ii) soil; (iii) subsoil; (iv) bedrock; (v) landform; (vi) wetland; (vii) water body or watercourse; (viii) air flow or wind currents; (ix) ambient sound volumes; (x) light or shade;

³⁸ Geospatial data does not account for O'Chiese First Nation's Natural Laws and the conditions required for O'Chiese First Nation members to exercise their Inherent and Treaty rights. As such, the 26% of remaining available lands may not be a full representation of the amount of lands actually available for the exercise of O'Chiese First Nation's Inherent and Treaty rights in accordance with our Natural Laws.

	All Study Area		Category 1 Lands		Category 2 Lands		Category 3 Lands		Category 4 Lands	
Lands Taken Up	3,944,865 ha	41%	3,269,596 ha	78%	170,740 ha	12%	414,729 ha	12%	89,800 ha	19%
Additional Lands Taken Up (500m Buffer)	3,055,006 ha	32%	250,860 ha	6%	518,863 ha	35%	2,030,077 ha	60%	255,206 ha	53%
Total Lands Taken Up	6,999,871 ha	74%	3,520,456 ha	84%	689,603 ha	47%	2,444,806 ha	72%	345,006 ha	72%

Table 1: Lands Taken Up in the Study Area

Regulatory processes fail to ask the question “how much is too much?”

Regulatory processes do not look at the big picture when they review a project application; they do not consider the current landscape surrounding the project and how the addition of the project will contribute to cumulative effects, including the taking up of lands for the exercise of Inherent and Treaty rights. This is also the case for when legislation, regulations, policies and plans pertaining to lands, resources, and development are created, there is no consideration for current levels of cumulative effects and lands taken up to understand how actions will contribute and influence further impacts to Inherent and Treaty rights and the environment.

As shown in Table 1 above and Figure 2 attached, Category 2 Lands are currently the least taken up by dispositions. The other land categories are far more taken up, making the preservation of what is left in all land categories that much more important to prevent further diminishment to Inherent and Treaty rights.

O’Chiese First Nation knows that disturbance and damages from human activity, including industrial development (such as coal), recreational, municipal, agriculture, and forestry, leave deep scars to landscapes that last beyond the lifecycle of the activity or project, and create violations to O’Chiese First Nation’s Inherent and Treaty rights and Natural Laws. These collective damages and violations from all human activity are not considered in regulatory processes.

In Figure 3 of the below provided map package, O’Chiese First Nation used ABMI geospatial data of disturbance within the study area to determine the current amount of lands that have a human footprint.

Within the total study area, 18% (1,671,291 ha) of lands currently have a human footprint, with 47% (4,473,102 ha) of lands in the study area falling within the 500m buffers attached to each human activity or disturbance within the study area. **There is a total of 65% (6,144,393 ha) of lands that are affected by a human footprint in the study area.** Table 2 below provides further details on current human footprint within the study area and within each land category.³⁹

³⁹ Note: Category 1 Lands contain Provincial and National Parks, which have a minimal human footprint due to the land and resource management and purposes of parks. Because of this, the results from the total study area are skewed, but when looking at human footprint levels in Category 2, 3, and 4 Lands, you see how much activity is present in areas where development is more actively permitted and present.

	All Study Area		Category 1 Lands		Category 2 Lands		Category 3 Lands		Category 4 Lands	
Human Footprint	1,671,291 ha	18%	217,991 ha	5%	286,827 ha	20%	1,008,438 ha	30%	158,035 ha	33%
Additional Human Footprint (500m Buffer)	4,473,102 ha	47%	955,028 ha	23%	912,807 ha	62%	2,313,951 ha	68%	291,317 ha	61%
Total Human Footprint	6,144,393 ha	65%	1,173,019 ha	28%	1,199,634 ha	82%	3,322,389 ha	98%	449,352 ha	93%

Table 2: Current Levels of Disturbance in the Study Area

The details in Table 2 above and Figure 3 attached show the extreme amount of human activity present in the study area, and specifically within Category 2, 3, and 4 Lands. The common perception held that there is lots of lands that remain undisturbed and away from human activity is false.

Disturbance extends beyond the lifecycle of mining operations, and reclamation standards identified by the Government of Alberta does not result in lands being returned to their full natural state. Reclamation standards and processes additionally do not take into consideration requirements for the exercise of Inherent and Treaty rights. For example, the Cheviot and Luscar Mines operated by Teck Resources Limited are both in the application process for closure and reclamation.⁴⁰ These two mines are in the heart of a critical cultural landscape to O'Chiese First Nation. The presence of these mines has had deep impacts on O'Chiese First Nation's ability to maintain our cultural connections to the land and continue to exercise our Inherent and Treaty rights. Unfortunately, this is not being considered by the regulator in the closure and reclamation application process; The two applications filed with the Alberta Energy Regulator do not require consultation by Teck with impacted Indigenous nations, including O'Chiese First Nation. This places the impacted Nations at the mercy of the proponent's goodwill and provides no assurances that Teck will be able or willing to reclaim the mine sites to their natural states and eliminate all disturbance caused by the development and operation of the coal mines.

In Figure 4 of the below provided map package, O'Chiese First Nation reviewed both lands taken up and human activity levels to determine lands that may be 'suitable' for the exercise of O'Chiese First Nation's Inherent and Treaty rights. Suitability was determined based on whether the lands

- 1) were unoccupied Crown lands, and,
- 2) did not fall within a 500m buffer or lands taken up or human footprint.

Within the study area, 93% (8,853,118 ha) of lands are not suitable for the exercise of rights and as such are in violation to O'Chiese First Nation's Inherent and Treaty rights and Natural Laws; Currently, only 8% (660,972 ha) of lands within the study area may be suitable for the exercise of Inherent and Treaty rights.⁴¹

⁴⁰ Applications 1932885 and 00011767-032 respectively.

⁴¹ Geospatial data cannot identify specific conditions at each site that may, or may not, align with the conditions required and Natural Laws of O'Chiese First Nation for the exercise of Inherent and Treaty rights. Further, access was not a parameter used when looking at suitability for this evidence. It is possible that there are lands that are objectively

	All Study Area		Category 1 Lands		Category 2 Lands		Category 3 Lands		Category 4 Lands	
Land Violated	5,192,767 ha	55%	3,362,399 ha	80%	399,330 ha	27%	1,221,472 ha	36%	209,565 ha	44%
Additional Land Violated (500m Buffer)	3,660,351 ha	38%	460,163 ha	11%	835,715 ha	57%	2,111,740 ha	62%	253,255 ha	53%
Total Land Violated	8,853,118 ha	93%	3,822,562 ha	92%	1,235,044 ha	84%	3,333,212 ha	98%	462,821 ha	96%

Table 3: Land Violated in the Study Area

The results of O’Chiese First Nations assessment of lands taken up and disturbance levels currently found in the study area reflect and confirm what Nation members already know; **there is essentially no land left** within Category 1, 2, 3, or 4 Lands that can facilitate the meaningful practice of Inherent and Treaty rights in accordance with Natural Laws.

Concluding Remarks

The Government of Alberta’s approach to coal regulation and it’s deficient understanding of Inherent and Treaty rights demonstrates a notable bias towards development at the expense of the environment and O’Chiese First Nation’s Inherent and Treaty rights.

It appears that the Government of Alberta is completing this consultation process on coal policy as an exercise in appeasement to widespread public lack of confidence in the government and the management of coal development. The Government of Alberta has made no efforts to provide a platform where meaningful consultation can occur. There has been no capacity provided to O’Chiese First Nation for our participation, nor has the Government of Alberta demonstrated a willingness or ability to respond to any of our concerns or information requests made since the start of our engagement in this process.

The Government of Alberta must be able to show that it has grappled with our concerns and considered our Inherent and Treaty rights explicitly before it can discharge the duty to consult and accommodate in this process. At this time, and within the current consultation process, the Government of Alberta has not done this. We urge the Government of Alberta not to end consultation without ensuring that it takes every step to conduct meaningful two-way dialogue and has made deep considerations of identified concerns and deficiencies

As detailed by the evidence presented in our written submission, coal development projects individually and cumulatively with other development activities present on the lands have resulted in significant impacts to lands and resources and the significant diminishment of our Inherent and Treaty rights.

It is critical that the Government of Alberta reevaluate its approach to managing lands and resources and regulating coal and other development activities, starting with:

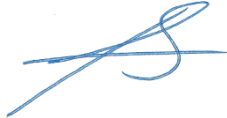
- 1) the expansion of the Government of Alberta’s definition of Inherent and Treaty rights.
- 2) the express considerations to current levels of cumulative effects.

available for the exercise of Inherent and Treaty rights, but Nation members cannot access them due to physical barriers (i.e., fences or gates) or legal barriers (i.e., requiring permission to enter) present on surrounding lands. This would need to be confirmed by site visits, which was out of scope due to time, and capacity constraints coupled with Covid-19 health and safety restrictions.

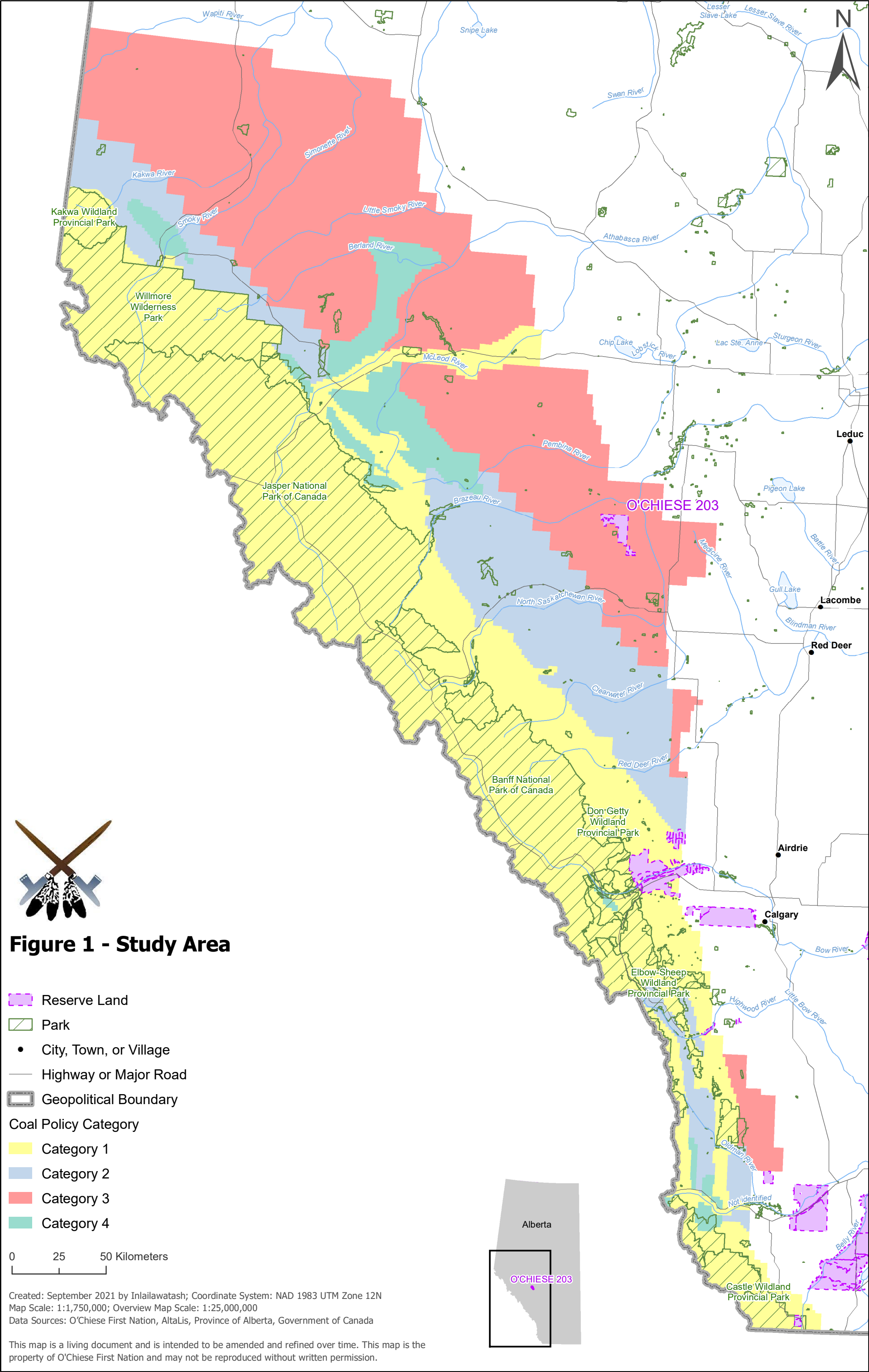
3) the setting of thresholds for lands taken up and infringement.

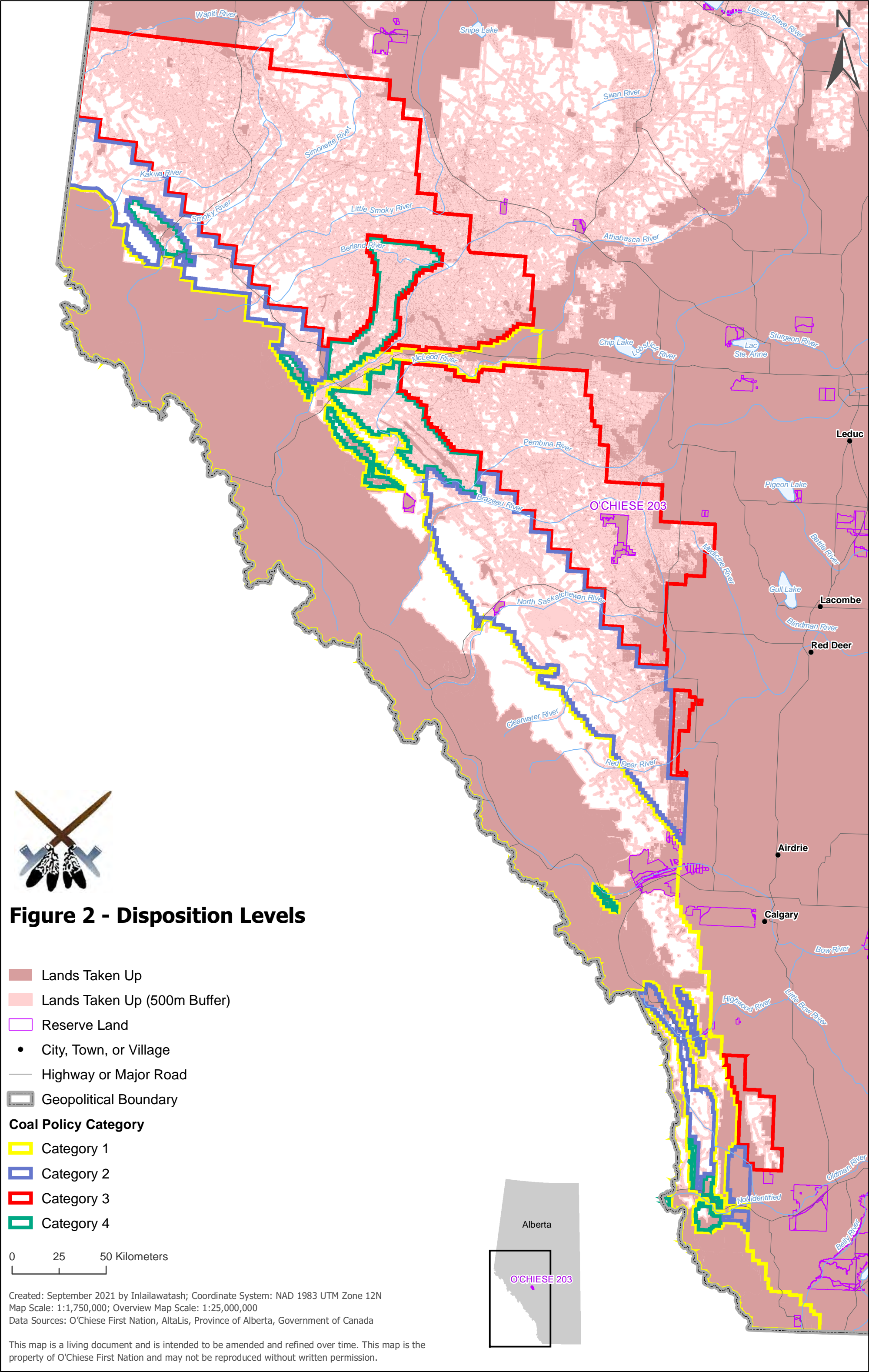
Until such time that legislation, regulations, policies, and regulatory processes are updated to ensure the Government of Alberta's fulfillment of treaty promises and the protection of our Inherent and Treaty rights and Natural Laws, no coal policy should be developed, and no new coal development activities should be permitted.

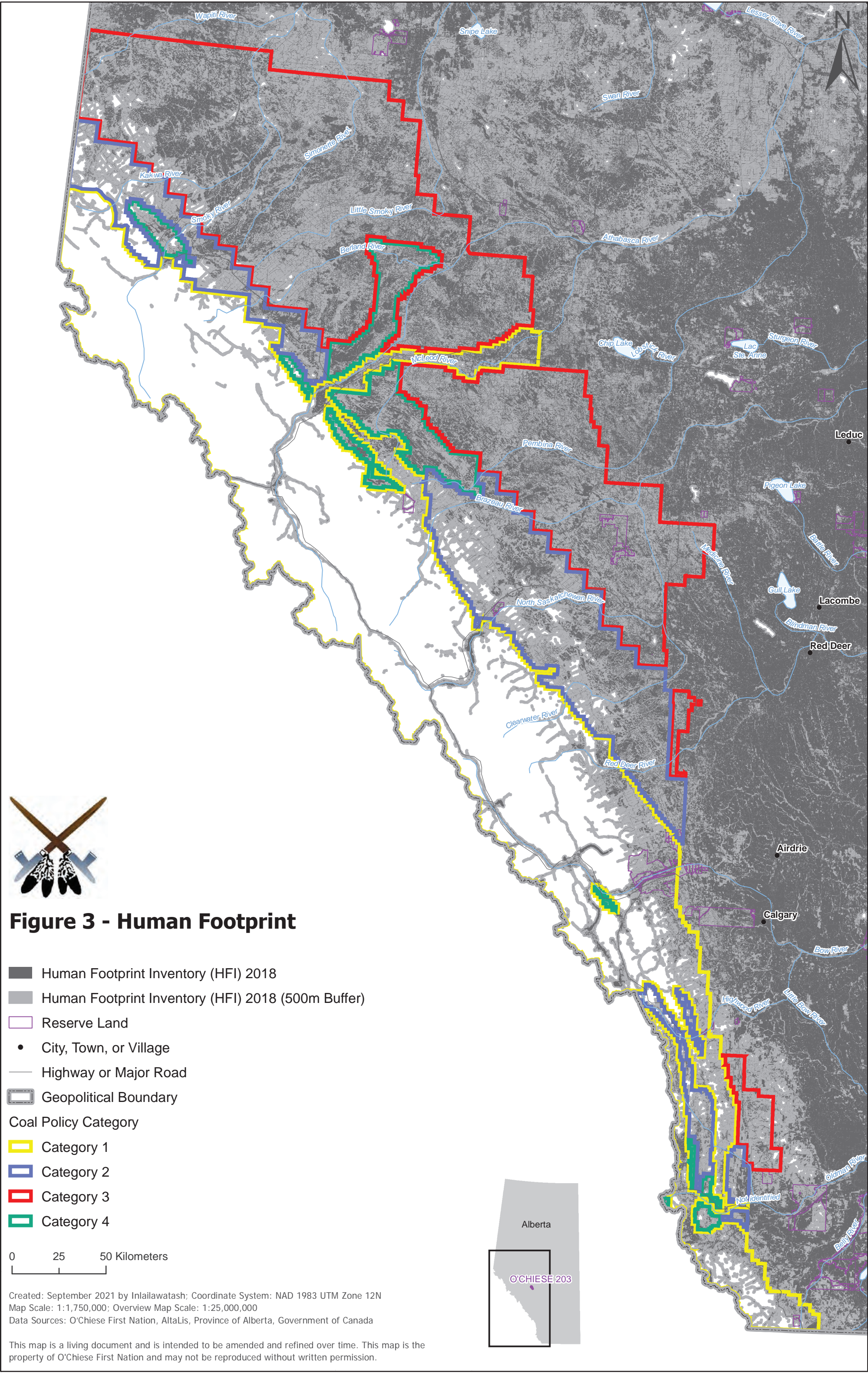
Sincerely,

A handwritten signature in blue ink, appearing to be 'AS' or 'Scott', written over a horizontal line.

Andrew Scott
Consultation Director
O'Chiese Consultation Office







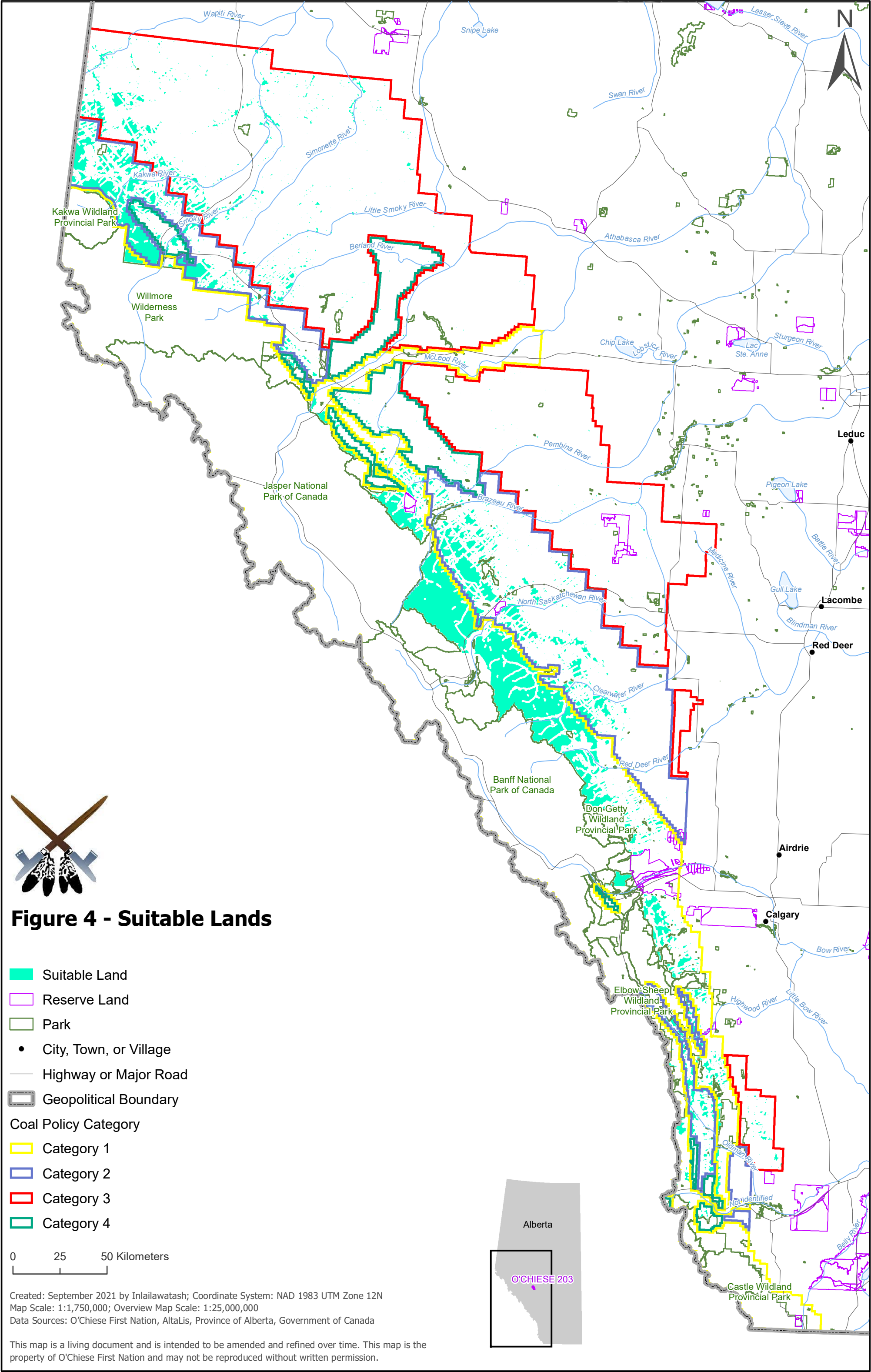


Figure 4 - Suitable Lands

Created: September 2021 by Inlailawatash; Coordinate System: NAD 1983 UTM Zone 12N
Map Scale: 1:1,750,000; Overview Map Scale: 1:25,000,000
Data Sources: O'Chiese First Nation, AltaLis, Province of Alberta, Government of Canada

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